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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 32

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, deceased,

Petitioners,

v.

ETHEL ADELAIDE FIELD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

FRANCIS F. WELSH,
CHARLES DANZIG,
WALLACE R. CHANDLER, JR.,
HOOD, LAFFERTY & CAMPBELL,
Solicitors of Petitioners.

FRANCIS F. WELSH,
Of Counsel with Petitioners.

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Counsel for the respondent has stated (Respondent's brief, p. 5) that tentative trusts have been found socially desirable by many states and have been generally accepted and cites *Restatement of the Law of Trusts* as his authority. It is respectfully submitted that the courts of New Jersey are not bound by decisions of sister states in determining the legal effect to be placed upon such so-called trusts locally in New Jersey.

Inasmuch as the respondent has devoted a considerable portion of her brief to attacking the decisions of *Thatcher* v. *Trenton Trust Co.*, 119 N. J. Eq. 408, and *Travers* v.

Reid, 119 N. J. Eq. ~~406~~ 416, which have established the law of New Jersey as to the so-called tentative trusts, it is appropriate to consider these decisions a little more fully.

The respondent, in her brief, speaks of these cases as having nullified the New Jersey statutes in question concerning trust deposits (The statutes are set forth in full in Appendix A of petitioner's original brief, page 28 *et seq.*). An examination of the text of both decisions, however, shows that the issue before the Vice Chancellors was not the validity of the statute in question, but its construction, and more particularly whether the statutory text was such as to make it applicable to the facts in the case before them. As Vice Chancellor Buchanan said in *Thatcher* v. *Trenton Trust Co., supra,* at the bottom of page 415:

> "For the reasons herein set forth in its concluded that the statute of 1932 is inoperative,—certainly so far as the instant case is concerned,—to change the law applicable to the facts herein as hereinbefore mentioned; and that the claimant has not proved his claim to the funds in question."

It is true that in both cases constitutional objections were hinted at, but in each case the court disclaimed such objections as being the *ratio decidendi.*

Under the New Jersey common law, a deposit made to the credit of A, but entitled "A in trust for B", where A retains all the attributes of ownership and domination, including the right to make subsequent deposits and to withdraw the same, and where no control is lodged with B during his lifetime, is testamentary in character and not being in accordance with the New Jersey Statute of Wills, it cannot be given effect; nor is such a deposit a gift, since there is neither a presently effective donative intent nor a delivery of the subject matter of the gift, either symbolic or

otherwise. This was established by the cases cited in the petitioner's original brief.

The Vice Chancellors were confronted with a problem as to whether the basic rule of New Jersey was, under the particular facts, changed or modified by the statute in question. As Vice Chancellor Buchanan (*Thatcher* v. *Trenton Trust Co., supra,* at page 413) said, consideration of the first part of the act, and giving to the words used their natural and ordinary meaning, would lead to the conclusion that the statute referred to, and was intended to apply to, instances where there had been created a valid trust in the bank credit. The statute reads "whenever any deposit shall be made * * * in trust for another", not "whenever any deposit shall be made to the credit of one person in trust for another." A deposit is not, in fact, made under New Jersey law in trust for another unless a valid trust has been intended and created. As to the instant case, no valid trust was created. A statute which refers to and applies only to the instance where a valid trust has already been created, cannot affect the instant case. The opinion then quotes certain parts of the statute in question, all of which leads to the inescapable conclusion that the statute does not apply to factual situations of the kind under review, and was not so intended by the legislature.

The respondent, on page 10 of her brief, suggested that to remove from the operation of the statute cases similar to those *sub judice* would render it meaningless. This does not follow; it provides for the method of disposition when the elements of a valid trust exist, but no more notice than appears in the designation of the account is given to the depository.

In the case of *Travers* v. *Reid, supra,* Vice Chancellor Berry, at page 422, arrived at the same conclusion that the

statute necessarily presupposes the existence of the elements of a legal and valid trust, and in the case before him, none of those elements, tested by New Jersey law, existed, and the statute does not apply. The assumption that the legislative intent was overruled by the construction given to the statutes in the Court of Chancery is based on erroneous conclusions. Whatever the legislature may have intended to have been included within the scope of the statute, there is nothing to indicate that the statute was to control in situations similar to the case cited or the case *sub judice,* where the facts were parallel. Nor did the Vice Chancellor violate any canon of construction applied by the New Jersey courts, as respondent urges at pages 9 and 11 of her brief. In *Ott* v. *Braddock,* 119 N. J. L. 507, 197 Atl. 271, cited at pages 9 and 10 of respondent's brief, the canon of construction involved pertained to the sufficiency of the title of the act as an expression of its object, as required by the New Jersey Constitution and not the constitutionality of the body of the statute itself.

It would be ridiculous to contend that the decisions of the Court of Chancery are binding upon the Court of Errors and Appeals, which is the court of last resort, but the fact that decisions of an important state court are subject to review by a final court, does not impair the power of the court to determine and make state law. Their decisions will establish and settle the law until they are reversed or overruled, or until the legislature should see fit to make a change, and, in fact, this is the contingent fate of the decisions of all state courts, whether final or otherwise. We agree with the respondent that the doctrine of *stare decisis* is not a mere mechanical formula of adherence to the latest decision, but it is not for the Federal courts to determine in matters of local law when social, economical or

political policies require a departure. In fact, it was the insistence of Federal courts of their right to assert this prerogative that led to the doctrine established by this court in the case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.

We now advert to the statement on page 11 of the respondent's brief that decisions of the Court of Chancery are not binding upon the Supreme Court of New Jersey. As the courts are both of equal importance in the judicial structure, it is perhaps true that the decisions of one court are not strictly binding upon the other, but each court has, throughout the history of New Jersey jurisprudence, accorded the greatest respect to the opinions of the other court. The examples cited by the respondent do not support a contrary thesis. Thus, in the case of *Flagg* v. *Johansen,* 124 N. J. L. 456, cited by the respondent, it appeared that the Court of Chancery had never rendered an adverse decision upon the matter which was before the Supreme Court. The Supreme Court was concerned with the construction of a statute and incidentally commented on the effect to be given to a statement appended to a legislative bill upon its introduction, as indicative of the legislative intent. The Supreme Court quoted with express approval prior decisions of the Chancellor in support of its conclusions, as a reference to the case will disclose. As to the excerpt quoted from the case by the respondent the Supreme Court did not say that the opinion of the Court of Chancery in the case cited was opposed to conclusions of the Supreme Court; it did no further than state that there was nothing in the opinion which tended to influence it in its conclusions. In the case of *Stabel* v. *Gertel,* 11 N. J. Misc. 247, 165 Atl. 876, quoted on page 12 of respondent's brief, the Supreme Court was confronted with conflicting

decisions of the Court of Chancery upon the same point (*McGoldrick* v. *Grebstein*, 108 N. J. Eq. 335; 154 Atl. 844; *Weyer* v. *Weyer*, 106 N. J. Eq. 112, 117; 150 Atl. 232), and it had no option but to make an independent determination of the law. It is interesting that this case was decided on March 27, 1933, and the case of *Kicey* v. *Kicey*, 112 N. J. Eq. 459, 164 Atl. 684, also cited by the respondent as being in accord with the Supreme Court case, was decided prior to the Supreme Court case, that is, on March 4, 1933, so that any seeming conflict was resolved by the Court of Chancery's power of self-correction, and the final result was subsequently confirmed by the highest court, the Court of Errors and Appeals, as appears in respondent's brief.

If there be a conflict of opinion between coordinate state courts or in the same court, the New Jersey cases cited in the respondent's brief afford a striking example as to the operation of the corrective process of the state judicial system by which a uniform result may ultimately be achieved. However, if there is a conflict between the state and the Federal courts, there is no means by which the corrective machinery may be invoked. If there be an error in the state decision, then the same will be perpetuated in the state law if the Federal courts are free to disregard it. The litigants, instead of resorting to state courts where, in the natural course of evolution the error will be corrected, will be encouraged to resort to the Federal courts, under the diversity of citizenship jurisdiction, to avoid the effect of the state decision, thus establishing two sets of legal principles which cannot be subsequently harmonized; and who is there to say which court is erroneous? But if a state court disagrees with another state court as to the state law in the ordinary course of events, the divergence will ultimately disappear; if a Federal court arro-

gates to itself the power to say that a state court is in error, the purpose of *Erie Railroad Co.* v. *Tompkins* will have failed.

The respondent, at page 15 of her brief, in her discussion of the effect of the statutory revision of 1937, suggests that the commission on revision of the New Jersey statutory law did not have in mind the judicial construction of the statute under consideration. In this the respondent errs, for in its report the Commission on Revision and Consolidation of the Public Statutes says at page 9: "If the legislation has been construed by the courts, the construction placed upon the legislation by the courts has been carried into the revision * * *." That the effect of the revision is to be regarded as a legislative adoption of the original statute as construed by the courts, is demonstrated by the cases cited in our original brief, and we add that the case of *Helvering* v. *Hallock*, 84 L. Ed. Advance Opinions 382, cited by the respondent at page 15 of her brief, was not dealing with a positive act of Congress; it was explaining the effect of non-action. There is a vast difference between the failure of the legislative body to act and the effect of positive enactment. The *Helvering* case is not in point.

In the case of *Burns Mortgage Company* v. *Fried*, 292 U. S. 487, 78 L. Ed. 1380, the court was not faced with the situation where an important state court, exercising statewide jurisdiction, had passed upon the points involved; the inequality which would result if a Federal Court were free to make an independent determination of the law which had already been passed on and settled by a court of statewide jurisdiction was not brought to the attention of the Court. In brief the decision antedated *Erie R. R.* v. *Tompkins*, 304 U. S. 202, 82 L. Ed. 1290, which obligated

the Federal Courts, under their diversity of citizenship jurisdiction to ascertain the state law and apply it. No authority or power is vested in them to depart from the principles of *stare decisis* or to overrule or reverse state decisions where jurisdiction rests on diversity of citizenship. *Minnesota ex rel. Pearon* v. *Probate Court, Ramsey Co.*, Vol. 84, L. Ed. Advance Opinions 477 cited by respondent at page 19 of her brief is not to the contrary.

Respondent's statement at page 21 of her brief that in *Blair* v. *Commissioner of Internal Revenue,* 300 U. S. 5, 81 L. Ed. 465, "this court found the decision of the state appellate court referred to was *res adjudicata*" is incorrect. The decision rested on the ground that a high state court had found that the interest of the beneficiary in the trust was assignable. To this proceeding in the state court the government was not a party nor claiming through any part to the suit. The doctrine of *res adjudicata* was therefore inapplicable. The only mention of the doctrine in the *Blair* case was in connection with previous tax litigation (antedating the construction of the trust and the assignment by the State Court) wherein the Circuit Court of Appeals held the assignment of the income invalid under Illinois law pertaining to spendthrift trusts. *Commissioner of Internal Revenue* v. *Blair,* 60 Fed. (2d) 340. Certiorari denied 288 U. S. 602, 77 L. Ed. 977.

The respondent suggested on page 22 of her brief that the decision of this court in the case of *Erie Railroad Co.* v. *Hilt,* 247 U. S. 97, L. Ed. 1003, was influenced by the fact that the court was in agreement with the statutory interpretation of the New Jersey Supreme Court. If the review of the Supreme Court of the United States of the decision of the Circuit Court of Appeals in the *Hilt* case were intended to be confined to the intrinsic merits of the deci-

sion of that court, the Supreme Court probably would not have granted the application for the writ of certiorari, since no matter of great public importance was involved. The granting of the Writ must have been on the ground that the lower court decision was in conflict with the state law; this was the issue before the Supreme Court and the review was limited to this issue. The foregoing was confirmed by the opinion of this court in the case of *Erie Railroad Co.* v. *Duplak,* 284 U. S. 440 (1932), 76 L. Ed. 1214, cited in our original brief.

As to the discussion by respondent on pages 24 and 25 of her brief of the comparable functions of the New Jersey Supreme Court and the New Jersey Court of Chancery, little need be added to what was said in our original brief. It is submitted that the matter of votes to which the members of the respective courts are entitled in the New Jersey Court of Errors and Appeals seems of little or no importance, and we would point out that while the Chancellor is disqualified in participating in a review of his own decisions, the disqualification likewise extends to such of the Supreme Court Justices sitting in the final court who have passed upon the matter below; nor is it of import whether the state decisions were made by a court sitting as a reviewing tribunal or in its *nisi prius* capacity. Would it be seriously contended that, if the decision of the New Jersey Supreme Court, confirmed in the *Hilt* case, had been rendered in its capacity as a trial court, the result would have been different?

And the case of *Irving National Bank* v. *Law,* 9 Fed. (2d) 536, is not opposed to the petitioner's contention. The court made particular mention of the fact that the state decisions were in only one department and were authoritative there. The point involved had never been

passed upon in another court of the New York Appellate Division. The court properly stated that in this situation the question was to be deemed open in New York State. As comparable state courts are not required to follow the decisions of a parochial court, the Federal courts are not charged with any higher degree of obedience; it is their duty to apply the state law as the state courts would do under similar circumstances. Moreover the decision in the *Law* case antedates *Erie R. R.* v. *Tompkins, supra. Russell* v. *Todd,* 84 L. Ed. Advance Opinions 517, quoted in the respondent's brief at page 25 did not indicate accord with *Irving Nat. Bank* v. *Law, supra,* and the Court did not decline to give effect to state law shown to be applicable.

It is, accordingly, submitted that not only was the Court of Chancery entirely correct in its construction of the 1932 statute, and the Circuit Court of Appeals for the Third Circuit applied an erroneous construction of the statute, but in any case, it was the duty of the Federal court to harmonize its findings with the New Jersey law as ascertained, established and fixed by the Court of Chancery of New Jersey and confirmed by subsequent legislation re-enacting the statute as construed by the Court of Chancery.

Respectfully submitted,

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